

Powers of Attorney, Health Care Directives and Substitute Decision Makers Guidelines for Pharmacists and Pharmacy Technicians

BACKGROUND

In this document, except where the context indicates otherwise, member(s) include(s) licensed pharmacist(s) and pharmacy technician(s).

These guidelines are intended to provide general guidance to members with respect to the differences between powers of attorney and health care directives. It is important for members to understand the distinction between these two types of documents; particularly in situations where members must determine who is authorized to make treatment decisions for individuals who are unable to make these decisions themselves.

WHY THE DISTINCTION MATTERS

- In Saskatchewan:
 - health care decisions of individuals who lack the capacity to make a health care decision respecting a proposed treatment are specifically governed by *The Health Care Directives and Substitute Health Care Decision Makers Act* (Saskatchewan); and
 - powers of attorney are governed by *The Powers of Attorney Act, 2002*.
- Although a power of attorney may provide the attorney with the power to act on the grantor's behalf with respect to property and financial affairs as well as personal affairs, *a power of attorney does not give the attorney the power to make health care decisions on behalf of the grantor.*
- In addition to granting the power to make health care decisions, health care directives will result in the ability of the substitute decision maker to access certain health care information of the person requiring treatment, to the extent that it is necessary for their decision to be an informed one.

DETAILED DISCUSSION OF DISTINCTION

(a) Health Care Decisions

Health Care Directives

In Saskatchewan, health care directives are governed by *The Health Care Directives and Substitute Health Care Decision Makers Act* (the "**Substitute Decision Makers Act**"). Health care directives may provide either specific or more general direction as to an individual's health care wishes. General health care directives serve as guidelines for future decision making but do not anticipate or give directions relating to treatment in certain situations, whereas specific health care directives give clear direction as to the individual's wishes for treatment in specific

circumstances. Under the *Substitute Decision Makers Act*, a "proxy" may also be appointed in a health care directive to make treatment decisions for the individual if he or she is unable to make those decisions.

Pursuant to the *Substitute Decision Makers Act*, an individual may execute a health care directive whereby the individual provides instructions that deal with: (1) the individual's health care decisions; (2) the appointment of a proxy; or (3) both the individual's health care decisions and the appointment of a proxy.

To be valid, a health care directive must comply with the formal requirements of the *Substitute Decision Makers Act*. Specifically, it must be in writing, dated, and signed. A health care directive may also be revoked pursuant to the *Substitute Decision Makers Act* and once this occurs it is no longer enforceable.

Where an individual requires treatment, but lacks capacity to make a health care decision, health care providers must first determine whether or not a health care directive has been validly made and remains in force. If a valid health care directive exists, the health care provider will have to determine the type of directive at issue and its impact on the situation. In particular, it will be necessary to determine whether the directive gives specific directions relating to the required treatment, if a proxy has been appointed in the directive to make treatment decisions for the individual and/or if a personal guardian has been appointed for the individual. If (i) a health care directive exists, but it does not give directions relating to the required treatment and has not appointed a proxy or a personal guardian has not been appointed for the individual who made the directive, or (ii) if there is no health care directive at all and no appointed personal guardian, the treatment decision will fall to the "nearest relative" (as defined in the *Substitute Decision Makers Act*) who is willing, available and has the capacity to make a health care decision.

Nearest relative includes (in descending order) the following: spouse; adult child; parent or legal custodian; adult brother or sister; grandparent; adult grandchild; adult uncle or aunt; and adult nephew or niece. For example, in a situation where an individual lacks capacity to make a treatment decision, a health care directive has not been executed and a personal guardian has not been appointed for the individual, the first step would be to look to the individual's spouse.

It is important to note a few important points relating to the determination of the "nearest relative":

1. **Preference for eldest.** Where two or more relatives fall within the same category (for example, both are adult children), then the oldest of the two or more relatives is preferred. For example, if someone's spouse does not have the capacity, or is not available or willing to make the health care decision for the subject individual, then the oldest adult child would be considered the nearest relative for the purposes of the *Substitute Decision Makers Act* and would therefore be authorized to make health care decisions with respect to his/her parent, provided however, that the oldest child is willing, available and capable to make a health care decision.
2. **Adoptive relationships.** For the purpose of determining a "nearest relative", someone who is related through an adoptive relationship is treated as if they were a blood relative.

3. **Preference for whole blood relatives.** Where two or more relatives fall within the same category (for example, both are adult brothers but one brother only has one parent in common with the patient), then the decision of the whole blood relative (the brother who shares two parents with the patient) is preferred.
4. **Stepchildren.** Given that stepchildren are common in modern families, legislation in other jurisdictions specifically contemplates relatives who are not related by blood as possible substitute decision makers. However, the *Substitute Decision Makers Act* has not been updated in this way and, other than adoptive relationships, does not contemplate relatives not related by blood as possible "nearest relatives". As such, on a strict interpretation of the *Substitute Decision Makers Act*, it is unlikely that a step-relative can be a "nearest relative". As a result, where two or more relatives fall within the same category (for example, both are adult children but one of the children is a stepchild who has not been adopted), then the decision of the blood relative (the natural child) is preferred. Despite this apparent gap in the legislation, a stepchild can be a substitute decision maker if specifically appointed as a proxy in a health care directive.

Further to recent amendments, where no proxy, nearest relative, or personal guardian is readily available to make a health care decision for an individual who lacks capacity, "caregivers"¹ can make health care decisions with respect to "day-to-day treatments"² for individuals who lack capacity. It is important to note that the circumstances in which caregivers can make health care decisions are limited.

Powers of Attorney

The legislation in Saskatchewan which governs powers of attorney is *The Powers of Attorney Act, 2002* (the "PAA"). Similar to a health care directive, a power of attorney is a document through which one person (the "grantor") grants another person (the "attorney") powers to act on the grantor's behalf and in the grantor's name with respect to certain matters. However, unlike a health care directive, a grantor may appoint the attorney to act with respect to either personal affairs or property and financial affairs, or both. The grant may be specifically related to certain situations, or general and applying to a broad spectrum of affairs.

It is important to note that a power of attorney does not give the attorney the power to make health care decisions on behalf of the grantor where the grantor lacks capacity to do so. In the absence of a health care directive, health care decisions on behalf of an individual without capacity are not made by their power of attorney, but rather by their substitute decision maker, as determined by the *Substitute Decision Makers Act*.

¹ "caregivers" include proprietors of approved private-services homes pursuant to *The Private-Service Homes Regulations*, operators of approved homes pursuant to *The Mental Health Services Regulations*, certain foster parents of adults, personal attorneys as defined in the PAA, and persons authorized in writing by the proxy, personal guardian, or nearest relative (section 3.1 of *The Health Care Directives and Substitute Health Care Decision Makers Regulations* (the "SDM Regulations")).

² "day-to-day treatments" include physician's visits, routine procedures conducted in a physician's office, routine laboratory tests, foot care, basic eye exams, physiotherapy, speech language therapy, basic dental care, wound care, swallowing assessments, and hearing tests (section 3.2 of the SDM Regulations).

In cases where individuals are both a "nearest relative" under the Substitute Decision Makers Act as well as an attorney under a power of attorney, the determining factor as to whether that person can make a health care decision is whether he or she is permitted to make a health care decision under the Substitute Decision Makers Act. As such, if someone is a nearest relative and an attorney under a power of attorney, one must look to the Substitute Decision Makers Act to determine if that person has authority to make a health care decision and not the power of attorney.

In situations where an individual requires treatment but lacks the capacity to make a health care decision, health care providers should refer to the instruction sheet attached as Schedule "A".

(b) Release of Personal Health Information

The distinction between a health care directive and a power of attorney is also important where members receive requests for the release of personal health information from individuals other than the subject individuals themselves. Members must ensure that the individual making the request is actually authorized to access the subject individual's personal health information, prior to releasing the information in accordance with the request.

Health care providers are authorized by section 19 of the *Substitute Decision Makers Act* and by subsection 27(4)(d) of *The Health Information Protection Act (Saskatchewan)* ("HIPA") to disclose (without consent) the personal health information of an individual to a proxy, the nearest relative, personal guardian, or caregiver (as applicable) where it is necessary to enable that person to make an informed health care decision on behalf of the subject individual.

Furthermore, section 56(e) of HIPA provides that any right or power conferred on an individual under HIPA may be exercised by a person who is entitled, pursuant to the *Substitute Decision Makers Act*, to make a health care decision on behalf of the individual, where that individual does not have the capacity to give consent.

There may be circumstances where an attorney under a power of attorney may request access to the grantor's personal health information for other purposes (such as financial matters including filing tax returns or paying bills). It is important to note that a properly worded power of attorney would allow release of personal health information by the member to the attorney for matters specifically contemplated in the power of attorney. For example, if the power of attorney gives the attorney the authority to handle financial matters on behalf of the grantor, a member would be permitted to release personal health information to the attorney where the information is required to manage the grantor's financial affairs. The information released should be limited to the minimum amount of information required to manage the grantor's financial affairs.

Finally, it is also important to note that section 27(2)(c) of HIPA authorizes the release of personal health information to a subject individual's next of kin or someone with whom the subject individual has a close personal relationship, provided that (i) the personal health information relates to health services currently being provided to the subject individual; and (ii) the subject individual has not expressed a contrary intention to such disclosure. Any such disclosures should be made in accordance with the member's professional and ethical obligations.

Please see *Privacy-Secondary Purposes Guidelines*, available at:
https://scp.in1touch.org/document/3659/REF_Priv2_UseDisclosure_PHI_for_Secondary_Purpo

[ses_20161027.pdf](#) for more information regarding members' obligations to protect patients' personal health information pursuant to HIPA.

In situations where members receive requests for the release of personal health information from individuals other than the subject individual, on the basis of a power of attorney or a health care directive, members should refer to the instruction sheet attached as Schedule "B".

These guidelines are intended to provide general guidance only, and are not intended to be an exhaustive review of all requirements of the *Substitute Decision Makers Act*, or of all situations members may encounter. Members requiring assistance in interpreting these guidelines are encouraged to contact the Saskatchewan College of Pharmacy Professionals at 306-584-2292.

Questions?
info@saskpharm.ca

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Schedule "A"

Instruction Sheet - Health Care Decisions

In situations where an individual requires treatment but lacks the capacity to make a health care decision, the health care provider must determine whether or not the individual in question has made a directive pursuant to the *Substitute Decision Makers Act*.

1. If the individual has made a directive pursuant to the *Substitute Decision Makers Act*, review the directive and determine:
 - a) What type of directive is it?
 - i. **General** – A general directive does not clearly anticipate or give directions relating to treatment for specific circumstances that exist. This can be used as guidance as to the wishes of the individual, but cannot be treated as a health care decision by the individual. Consider item (2) below.
 - ii. **Specific** – A specific directive clearly anticipates and gives directions relating to treatment for specific circumstances that exist. This can be treated as a health care decision by the individual.
 - b) Does the directive appoint a proxy to make health care decisions for the individual? If it does, the proxy can make the health care decision for the individual.
 - c) Does the directive meet the formal requirements of the *Substitute Decision Makers Act* (namely, is it in writing, dated and signed)? If the formal requirements are not met, the directive is not valid.
 - d) Has the directive been revoked? If the directive has been revoked, the directive is not valid.
2. If the individual has not made a valid directive, or has not made a specific directive, consider (in order of priority):
 - a. Has the individual appointed a proxy or has a personal guardian been appointed? If so, these individuals can make a health care decision for the individual.
 - b. Is the proxy or personal guardian willing, available, and have the capacity to make a health care decision? If not, these individuals cannot make a health care decision for the individual.
 - c. Is the individual a professed member of a prescribed religious order? Ecclesiastical authorities designated by prescribed religious orders may make a health care decision on behalf of the individual in certain circumstances.
 - d. Does the individual have a nearest relative who is willing, available, and have the capacity to make a health care decision on behalf of the individual? If so, these individuals can make a health care decision for the individual in the following order of priority: spouse; adult child; parent or legal custodian; adult brother or sister; grandparent; adult grandchild; adult uncle or aunt; and adult nephew or niece.
 - e. If no nearest relative can be found, the member may provide treatment that is reasonably necessary and in the best interests of the individual if the member believes the treatment to be necessary and another treatment provider agrees in writing that treatment is necessary.
 - f. If the decision involves a day-to-day treatment (see definition above), and no proxy, nearest relative, or personal guardian is available, a caregiver (see definition above) may make a health care decision on behalf of the individual regarding the day-to-day treatment.

Schedule "B"

Instruction Sheet – Release of Personal Health Information

In situations where members receive requests for the release of personal health information from individuals other than the patient, pursuant to a power of attorney or a health care directive, members must consider whether the person making the request is actually authorized to access the patient's personal health information, prior to releasing the personal health information in accordance with the request.

1. Is the person requesting the information a proxy, nearest relative, personal guardian, or caregiver of the patient who requires the information in order to make an informed health care decision on behalf of the patient? If so, consider:
 - a) Has the person submitted a request for release of the patient's personal health information by completing the access request form attached as Appendix "I"?
 - b) Has the person's identity and status as proxy, nearest relative, personal guardian, or caregiver been verified (i.e., by reviewing a piece of government-issued identification and obtaining appropriate supporting information/documentation)?

If all of these conditions are met, the personal health information required to make an informed health care decision on behalf of the subject individual may be disclosed to the requestor.
2. Does the person requesting the information claim to be a power of attorney for the patient? If so, consider:
 - a) Has the person submitted a request for release of the patient's personal health information by completing the access request form attached as Appendix "I"?
 - b) Has the person's identity and status as a power of attorney been verified (i.e., by reviewing a piece of government-issued identification and obtaining appropriate supporting information/ documentation)?
 - c) Has the power of attorney been reviewed to determine the scope of the power of attorney's authority/rights?
 - d) Has the purpose for which the personal health information is being requested been reviewed to determine if there is authority for its release under *The Health Information Protection Act* (Saskatchewan) or any other applicable legislation?

Appendix "I"

REQUEST TO RELEASE PERSONAL HEALTH INFORMATION
SUBSTITUTE DECISION MAKER/ POWER OF ATTORNEY

I, _____ (please print), certify that I am
the

- proxy
- nearest relative
- personal guardian
- caregiver
- power of attorney

of/for _____ (the "Patient").

Specific Information Requested:

Purpose for Requesting the Information:

To verify my identity:

- I have produced a piece of government-issued identification for review by the recipient of this request form.

To verify my relationship with the Patient, I have attached the following to this request form:

- Copy of directive appointing me as proxy (must be attached for proxies).
- Copy of order appointing me as legal custodian (must be attached for legal custodians).
- Copy of directive appointing me as personal guardian (must be attached for personal guardians).
- Copy of power of attorney (must be attached for powers of attorney).

I understand that **[Insert name of member]** is relying on this request form to release personal health information to me about the Patient, as authorized under *The Health Information Protection Act* (Saskatchewan), *The Health Care Directives and Substitute Decision Makers Act* (Saskatchewan) and/or *The Powers of Attorney Act, 2002* (Saskatchewan) as applicable.

Signature

Date